

April 24, 2006

DECISION AND ORDER  
OF THE DEPARTMENT OF ENERGY

**Appeal**

Name of Petitioner: Citizen Action New Mexico

Date of Filing: November 22, 2005

Case Number: TFA-0134

Citizen Action New Mexico (Citizen Action) filed an Appeal from a determination that the National Nuclear Security Administration's Albuquerque Service Center (Service Center) issued on October 20, 2005. In that determination, the Service Center denied in part a request for information that Citizen Action had submitted on July 9, 2004, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The Service Center withheld information that was responsive to Citizen Action's request after it determined that two responsive documents contained unclassified controlled nuclear information (UCNI). This Appeal, if granted, would require the DOE to release those documents.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b).

**I. Background**

On July 9, 2004, Citizen Action requested the "most current and complete" inventories of hazardous waste constituents, irradiated reactor fuels, and reactor-irradiated nuclear materials which may be stored at various locations at Sandia Laboratories, Albuquerque, New Mexico. Among the documents the Service Center identified as responsive to Citizen Action's request were two documents, *Dense Pack Storage Holes Status Book* and *Monorail Storage Inventory Log*, both dated October 14, 2004. In her October 20, 2005 determination letter, the Service Center's Freedom of Information Act Officer stated that the documents contained UCNI, the disclosure of which is restricted by the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011 *et seq.*, and therefore warranted protection from disclosure under Exemption 3 in their entirety.

The present Appeal seeks the disclosure of the two documents described above. In its Appeal, Citizen Action contends that the Service Center "has provided no explanation

whatsoever for its determination” that the documents must be withheld from disclosure. Citizen Action also points out that the FOIA process “requires agencies to review and release all ‘reasonably segregable’ non-exempt information from agency records” and requests appropriately redacted versions of the documents that the Service Center withheld in their entirety.

## II. Analysis

Exemption 3 of the FOIA provides for withholding material “specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld.” 5 U.S.C. § 552(b)(3); *see* 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. *See, e.g., National Security Archive*, 29 DOE ¶ 80,171 (2004) (and cases cited therein). Section 148 of the Atomic Energy Act directs the Department of Energy to issue regulations or orders to protect from unauthorized dissemination information that has been determined to contain UCNI. 42 U.S.C. § 2168(a). These regulations appear at 10 C.F.R. Part 1017.

The Director of the Office of Security (the Director), has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of UCNI. DOE Delegation Order No. 00-030.00, Section 1.8 (December 6, 2001). This authority has now been delegated to the Deputy Director of the Office of Security and Safety Performance Assurance (SSPA). Upon referral of this appeal from the Office of Hearings and Appeals, the SSPA reviewed the documents that Citizen Action requested.

According to the Deputy Director, the SSPA determined on review that, based on current DOE classification guidance, the requested documents contain UCNI. The information that the SSPA identified as UCNI could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of theft, diversion, or sabotage of nuclear materials, equipment, or facilities. The SSPA also determined, however, that the majority of the documents’ content is not UCNI. The Deputy Director has provided this Office with copies of the documents from which the UCNI has been deleted. Beside each deletion, “DOE (b)(3)” has been written in the margin of the document. The denying official for these withholdings is Michael A. Kilpatrick, Deputy Director, Office of Security and Safety Performance Assurance, Department of Energy.

Based on the Deputy Director’s review, we have determined that the Atomic Energy Act requires the DOE to continue withholding portions of the documents under consideration in this Appeal. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, such

consideration is not permitted where, as in the application of Exemption 3, the disclosure is prohibited by executive order or statute. Therefore, those portions of the documents that the Deputy Director has now determined to be properly identified as UCNI must be withheld from disclosure. Nevertheless, the Deputy Director has reduced the extent of the information previously deleted to permit releasing the maximum amount of information consistent with national security considerations.

In view of the Deputy Director's findings, and at his suggestion, we have remanded these two documents to the Service Center for a new review, in which it must consider whether any portions of the documents that were previously identified as UCNI should now be released to Citizen Action. After completing its review, the Service Center should either release the currently redacted versions of the requested documents or issue a new determination that provides adequate justification for the withholding of any additional information from the documents it provides to Citizen Action. Citizen Action will have the opportunity to appeal that determination, if it so desires. Accordingly, Citizen Action's Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Citizen Action New Mexico on November 22, 2005, Case No. TFA-0134, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) The National Nuclear Security Administration's Albuquerque Service Center shall review the redacted versions of the documents entitled *Dense Pack Storage Holes Status Book*, dated October 14, 2004, and *Monorail Storage Inventory Log*, dated October 14, 2004, bearing markings indicating where all Unclassified Controlled Nuclear Information has been properly deleted. Upon completing its review, the National Nuclear Security Administration's Albuquerque Service Center shall either release those redacted versions in their entirety or issue a new determination that provides adequate justification for the withholding of any additional information from the copies it provides to Citizen Action New Mexico.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: April 24, 2006